

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimants

Anne Sill
Joan Fox
Barbara Kaluzny

91-01533

Name of Respondents

FiscI Securities, Inc.
Jacob Feldman
Jason MacKenzie Securities, Inc.

REPRESENTATION

For Claimants: Anne Sill, Joan Fox and Barbara Kaluzny were represented by Gary Saretsky, Esq. and Lisa M. Salvia, Esq. of Hertz, Schram & Saretsky, P.C., Bloomfield Hills, Michigan.

For Respondents: FiscI Securities, Inc. was represented by Brian H. Herschfus, Esq. of Wood & Wood, P.C., Farmington Hills, Michigan.

Jacob Feldman was represented by Walter L. Baumgardner, Esq. of Musilli & Baumgardner, P.C., St. Clair Shores, Michigan.

Jason MacKenzie Securities, Inc. was represented by Rex Lamb, III, Esq. of Smith, Grambell & Russell, P.C.

CASE INFORMATION

Statement of Claim filed: May 20, 1991.

Claimants' Submission Agreement signed on: August 14, 1990.

Amended Statement of Claim filed: July 1, 1991.

Statement of Answer and Affirmative Defenses filed by Respondent FiscI Securities, Inc. on: July 5, 1991.

Motion to Decline Jurisdiction filed by Respondent FiscI Securities, Inc. on: July 5, 1991.

Respondent FiscI Securities, Inc.'s Submission Agreement signed on: July 3, 1991 by David Glencer, President, FiscI Securities, Inc.

Motion to Preclude Respondent Jacob Feldman's Answer filed by Claimants on: July 15, 1991.

Motion to Decline Jurisdiction ("Statement of Answer") filed by Respondent Jacob Feldman on: August 6, 1991.
Respondent Jacob Feldman's Submission Agreement signed on: February 12, 1992.

Response to Respondent Jacob Feldman's Motion to Decline Jurisdiction filed by Claimants on: September 17, 1992.

Statement of Answer filed by Respondent Jason MacKenzie Securities, Inc. on: September 26, 1991.

Respondent Jason MacKenzie Securities, Inc.'s Submission Agreement signed on: September 20, 1991 by J. Paul Jason, President, Jason MacKenzie Securities, Inc.

HEARING INFORMATION

Pre-Hearing Conference: None Held.

Hearing Dates/Sessions: July 9, 1992 for Two (2) sessions
July 10, 1992 for Three (3) sessions
July 20, 1992 for One (1) session.

Hearing Location: Southfield, Michigan.

CASE SUMMARY

Claimants Anne Sill ("Sill"), Joan Fox and Barbara Kaluzny (collectively known as "Claimants") alleged that Respondent Jacob Feldman ("Feldman"), while employed by or acting as an agent for Respondents Fisci Securities, Inc. ("Fisci") and Jason MacKenzie Securities, Inc. ("Jason MacKenzie"), negligently placed Claimant Sill into investments which were unsuitable given Sill's investment objectives and financial needs. Claimants specifically alleged as follows:

1. Claimant Sill's husband, Bernard Sill, had been represented by Feldman for over 30 years, until his death on February 10, 1989 after a five year bout with cancer;
2. Approximately 3 weeks after Bernard's death, the Claimants met with Feldman to review her investment portfolio and told Feldman her investment objectives were to be in low risk securities, generating monthly income, and having liquidity in case any emergency arose;
3. Feldman told Claimants that the investments were in good quality, high yield, safe and secure funds, when in fact the investments in Sill's portfolio were composed primarily of high risk junk bonds. The portfolio contained the following investments: a) Delchester Bond Fund; b) Franklin Income Fund; c) Venture Income Plus; d) Centrevest; and e) Inter Active Services;
4. On or about May 31, 1989, Feldman strongly recommended the sale of Sill's investment in Venture Income Plus, a high risk junk bond fund, explaining that the junk bond market was depressed and would

remain so for a considerable amount of time. After the sale, Feldman recommended and eventually sold Sill an investment in the Franklin Age High Income Fund, which contained the same type and quality of bonds as Venture Income Plus;

5. Feldman recommended stocks to Sill which resulted in Long Term Capital Loss Carryover; and

6. Feldman was grossly negligent for recommending and investing approximately \$304,000.00 of Sill's funds, which represented over 80% of Sill's total net worth and for making the above recommendations in total disregard of Sill's investment objectives.

Based upon the above allegations, Claimants asserted an additional claim for Violation of the RICO act, 18 U.S.C. 1962-1968.

Respondent Fisci denied the material allegations of the Statement of Claim and Amended Statement of Claim, alleging that:

1. At the time of the purchase of the Franklin Age High Income Fund, Feldman was working for Jason MacKenzie, which handled the entire transaction;

2. Fisci cannot be liable for the earlier transactions because Fisci only came into being and was formed in March of 1989; and

3. Claimants have failed to allege fraud and therefore, cannot assert a claim for RICO.

Fisci asserted the following affirmative defenses:

1. Claimants' Statement of Claim fails to establish any fiduciary relationship between Claimants and Fisci;

2. The claims are barred by ratification, assumption of risk and because all transaction were authorized; and

3. Claimants failed to mitigate any damages allegedly sustained.

Respondent Feldman denied the material allegations of the Statement of Claim, alleging that:

1. All investments by Bernard Sill were done after mutual decision between Feldman and Bernard Sill, and Bernard Sill made most of his own decisions, since Feldman had no discretionary power of the account;

2. No one could predict the gross incompetence and mismanagement of the savings and loan associations resulting in the decreased value of the investments and nowhere in the offering circular are the investments called junk bonds;

3. The investments were appropriate and consistent with Sill's investment objectives as she was looking for income; and

4. Feldman increased the initial investment of Bernard Sill from \$20,000.00 to in excess of \$300,000.00, and therefore, would tender \$20,000.00 to the Claimants if they will turn the securities over to him as a result of his alleged gross negligence.

Respondent Jason MacKenzie denied the material allegations of the Claimants' Claim, alleging that:

1. Feldman was never employed by Jason MacKenzie and was only associated with it for the period beginning April 15, 1989 and ending October 27, 1989;
2. If Feldman met with Claimants approximately three weeks after Bernard Sill's death on February 10, 1989, then that meeting occurred before there was any relationship between Feldman and Jason MacKenzie;
3. Claimants have elected to retain their shares in the Franklin Age High Income Fund, Inc., have suffered no loss and have ratified the purchase of the shares;
4. The Amended Statement of Claim failed to state a claim against Jason MacKenzie upon which relief can be granted;
5. Claimants have ratified the transactions complained of and have waived any and all claims which they may have against Jason MacKenzie; and
6. Jason MacKenzie did not commit or participate in any wrongful act or omission regarding Claimants and had no liability to Claimants whatsoever.

RELIEF REQUESTED

Claimants requested entry of an award jointly and severally against the Respondents in the sum of \$151,566.86 in actual damages and \$454,700.58 in treble damages pursuant to the RICO claim.

Respondent Fisci requested that the claims asserted against it be dismissed and denied in their entirety.

Respondent Feldman requested that the Arbitration panel dismiss Claimants' claim and award him attorneys' fees sustained in defense of this claim.

Respondent Jason MacKenzie requested that it be dismissed from the proceeding without liability and that it recover its costs and expenses of defense, including reasonable attorneys' fees, from Claimants.

OTHER ISSUES CONSIDERED & DECIDED

On June 17, 1992, the arbitration panel ruled that the following motions presented by the parties would be denied:

1. Claimants' Motion to Preclude Respondent Jacob Feldman's

Answer;

2. Respondent Fiscal Securities, Inc.'s Motion to Decline Jurisdiction; and

3. Respondent Jacob Feldman's Motion to Decline Jurisdiction.

At the hearing, Respondent Fiscal Securities, Inc. presented a motion to dismiss at the close of Claimants' presentation of evidence. After review, the panel determined that the Motion to Dismiss was granted.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered. In either case, the parties have agreed to receive conformed copies of the Award while the originals remain on file with the NASD.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents Jason MacKenzie Securities, Inc. and Jacob Feldman are jointly and severally liable for and shall pay to Claimants Anne Sill, Joan Fox and Barbara Kaluzny the sum of Seven Thousand Eight Hundred (\$7,800.00) Dollars;

2. Respondent Fiscal Securities, Inc.'s Motion to Dismiss is hereby granted;

3. Claimants' claim for damages pursuant to the RICO act is hereby dismissed and denied in its entirety; and

4. The parties shall bear their own costs of arbitration, including attorneys' fees, except for those specifically enumerated herein.

OTHER COSTS

Pursuant to Section 43(c) of the NASD Code of Arbitration Procedure, Respondents Jason MacKenzie Securities, Inc. and Jacob Feldman are jointly and severally liable for and shall pay to Claimants Anne Sill, Joan Fox and Barbara Kaluzny the sum of \$250.00 as reimbursement of the non-refundable filing fee previously paid by the Claimants.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed: Six (6) sessions x \$1,000.00 = \$6,000.00.

The National Association of Securities Dealers, Inc. ("NASD") shall retain the claim filing fee of \$250.00 and refund the hearing session deposit of \$1,000.00 previously deposited by the Claimants. Respondents Jason MacKenzie Securities, Inc. and Jacob Feldman are jointly and severally liable for and

shall pay to NASD the sum of \$6,000.00 as forum fees.

Fees are payable to the National Association of Securities Dealers, Inc.

CONCURRENCE ARBITRATORS' SIGNATURES

Dated:

Harry A. Carson
Harry A. Carson, Esq.
Public Arbitrator
Chairperson

September 8, 1992

Ellis Brownstein
Ellis Brownstein
Public Arbitrator

September 10, 1992

Thomas C. Girardot
Thomas C. Girardot
Industry Arbitrator

September 9, 1992

Date of Service on Parties:

9-15-92